No. 93-397

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
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ASSOCIATED INDUSTRIES OF MISSOURI and ALUMAX FOILS, INC.,
Petitioners,

v.

JANETTE M. LOHMAN, DIRECTOR OF REVENUE, and DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, and THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI,
Respondents.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENTS DELONG'S, INCORPORATED, THE CITY OF BLUE SPRINGS, GARY MARKENSON, THE MISSOURI ASSOCIATION OF COUNTIES, THE MISSOURI MUNICIPAL LEAGUE, AND THE ASSOCIATED GENERAL CONTRACTORS OF MISSOURI

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QUESTIONS PRESENTED

1. When sales tax rates on in-state purchases of goods are partially determined by the state's local taxing jurisdictions and thus vary within the state, does a complementary statewide use tax on goods consumed in the state but purchased outside, unconstitutionally discriminate against interstate commerce if it is set at a rate much lower than the average rate applied to in-state sales, but higher than the lowest sales tax rate available somewhere in the state?

2. Should *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926) be overruled?

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COUNTERSTATEMENT OF THE CASE

This case presents a discrete, practical problem of state taxation. Through a compensating use tax, Missouri has tried to ensure that those persons or businesses purchasing goods outside the state for use in the state pay their fair share of taxes relative to those paying sales taxes on

purchases made in the state. The practical problem arises from the fact that sales tax rates are not uniform statewide, but are in part set locally. The sales tax rate thus varies depending on where in the state the purchase is made. A statewide use tax rate cannot be the "same" as all the varying sales tax rates. Therefore, the state must develop some equivalent rate which satisfies commerce clause concerns.

Factual Background

1. This case arises out of Missouri's attempt to establish a use tax on interstate purchases to complement the sales taxes imposed on in-state purchases. A combined sales tax of 4.225% is levied statewide on all personal goods purchased in the state (App. 34). Mo. Rev. Stat. (1992) § 144.020; Mo. Const. Art. IV, §§ 43(a), 47(a). In addition, counties and incorporated villages, towns and municipalities are authorized to impose local sales taxes beyond the 4.225% levied statewide (App. 34).[1] Most every locality in Missouri with the authority has done so.

2. There are 928 incorporated municipal[2] taxing jurisdictions within the state and 114 counties. In every instance (with the exception of St. Louis City), towns, cities and villages are located within counties. Thus, in connection with most purchases of goods, the seller will generally remit a county sales tax and, if the sale takes place in an incorporated municipality, that tax as well. That the municipal sales tax rate in Clinton, Missouri is 1%, for instance, is of little comfort to the shopper

[1] *See, e.g.*, Mo. Rev. Stat. (1992) §§ 66.600-630; 67.500-545; 92.400-420; 94.500-510; 94.600-655; 94.700-745. All citations referenced by "§" are to Revised Statutes of Missouri.

[2] Official Manual, State of Missouri, 892 (1993-94). The Official Manual, State of Missouri, is published biennially by the Missouri Secretary of State pursuant to § 11.020. Of the 928 incorporated municipalities, 91 are located within St. Louis County. The record reflects that the local sales tax rate in all parts of St. Louis County is uniformly 1.5%.

who must also pay the additional .5% sales tax imposed by Henry County. That being said, it is true that there are areas within Missouri where the effective sales tax rate—composed of the state, the county and any municipal tax—is lower than the use tax rate, and in what appears to be the majority of these "jurisdictions"[3] the overall sales tax is lower than the use tax.

3. As respects the economic impact of the sales tax, however, the reference to the majority of jurisdictions is misleading. As of 1990 (the year which is the primary focus of the evidence in the record), a supplemental sales tax of 1.5% or more was levied in cities and counties accounting for 73.5% of Missouri's population and on 93.14% of Missouri's taxable sales (Record, in Legal File, at 333, 531).[4] In some areas, purchasers pay up

[3] References to more than 1500 "taxing jurisdictions," *e.g.*, Pet. Br. at 7, are apparently drawn from listings by locales. *See, e.g.*, App. 67, and the "Chart of City and County Sales Tax Rates" set forth in the Missouri State Tax Reporter (CCH) ¶ 60-430 at 6167-93 (1990) (*see* Record, in Supplemental Legal File at 11-37). These are not, however, listings of "taxing jurisdictions." They include not only counties and incorporated municipalities, but also general census or locale designations—such as crossroads and other identifiable areas—which are not "taxing jurisdictions," but merely unincorporated areas within counties.

Only counties and incorporated municipalities have authority to impose local sales taxes. It is therefore more accurate to say that there are approximately 1042 potential "taxing jurisdictions"—that is, the approximately 928 incorporated municipalities plus the 114 counties in Missouri. The record reflects that when a county adopts a local sales tax, the tax is applicable to sales throughout the county—both outside of and within incorporated municipalities. The record further reflects that 112 counties plus the City of St. Louis have adopted local sales taxes—with only Dunklin and Reynolds Counties not having done so. Of the 5.2 million Missouri residents, 32,070 reside in Dunklin County and 6,723 reside in Reynolds County, for a total of 38,793. Of those 38,793, it appears that 23,984 live in municipalities which have local sales taxes. Missouri Official Manual, 854-891.

[4] As is typical of sales taxes, the tax is based on the rate in effect where the purchase is made (where the seller is located)

to 3.5% in additional sales taxes (App. 67).[5] Those areas in which sales are taxed at a rate of 5.725% or more (that is, 1.5% above the 4.225% imposed statewide) include virtually all of Missouri's largest and fastest growing cities and communities, those with large populations, concentrated and thriving business communities, and expensive infrastructures to support. The fast-growing City of Branson, for instance, currently imposes a combined city/county sales tax rate of 3%. Multistate Sales Tax Guide (CCH) 6-150MO at 11,533 (1994). In contrast, those areas with an effective sales tax rate lower than 1.5% tend to be the least populated in Missouri.[6] Two of the several localities specifically cited in

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rather than where the goods are delivered or where the purchaser resides. § 144.021. The only exception is for the purchase of automobiles and boats. § 144.020 1(8). Levying a tax by place of residence generally creates a potential for abuse because one must rely on the purchaser to accurately report its residence. Sales taxes are relatively easy to administer because the seller applies the same tax on every sale. *See* J. Hellerstein and W. Hellerstein, *State Taxation*, ¶ 16.01 (1993). With respect to automobiles, the registration on the automobile tells definitively where the residence is.

[5] Overall, the average sales tax rate on in-state transactions was 1.811%. (As derived from App. 68.)

[6] Of the approximately 928 incorporated Missouri municipalities, only one (Clarkton in Dunklin County) has no local sales tax (municipal and/or county) in effect. Indeed, in 174 of the 179 largest Missouri municipalities (those with a population in excess of 2,500), sales are subjected to a combined city/county local sales tax of 1.5% or more. The rate is 1.5% or more in *each* of those cities with a population in excess of 12,500. *Compare* Missouri Official Manual, 982-927 *with* Multistate Sales Tax Guide (CCH) 6-150MO at 11,531-557 (1994). One city with a population in excess of 6,000, Monett, formerly had a 1.87% tax rate in that part of the City within Laurence County, and a rate of 1.375% in that part within Barry County. Monett now has a tax rate of 1.875% throughout. *Id.*

Moreover, it appears that in 173 of 188 incorporated municipalities which have populations of between 750 and 2,500, the combined local sales tax rate is 1.5% or more. *Id.* Finally, of 90 incorporated

the parties' stipulations below as having sales tax rates lower than the use tax rate (Bixby and Glover in Iron County) could claim absolutely *no* residents in 1990. Three others had only sparse populations (Brandsville—167; Winston—251; New Cambria—223; and Gordonville—345). *Compare* App. 35 *with* Missouri Official Manual, 892-927 (1993-94).

4. The record in this case was built primarily around the sales tax rates in effect in 1990. The court below found as fact that those taxes were unlikely to decrease. (Pet. App. A-38.)[7] Indeed, the record shows that when sales taxes have expired, localities have usually raised the rate. (Record, in Legal File, at 358-378, 307-310.)

5. As a complement to the sales tax, a statewide use tax of 4.225% has long been imposed on the out-of-state purchase of goods brought to, used or stored in Missouri. § 144.610. The tax is typically collected by the out-of-state vendor—at least if the vendor has sufficient contacts with the state to make such collection constitutionally appropriate. § 144.635. The use tax complements the sales tax, assuring that the sales tax levy is not frustrated by purchases in interstate, rather than intrastate, commerce.

Before 1922, then, there was a statewide sales tax and a statewide use tax, both at a rate of 4.225%. The sales tax, however, was supplemented at local level.[8]

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municipalities with populations of between 500 and 750, the combined local sales tax in 70 is 1.5% or higher. *Id.*

[7] That factual prediction has been borne out. Sales taxes have generally gone up, not down. *Compare* Record, in Supplemental Legal File 11-37 (Missouri Tax Reporter (CCH) for 1990) *with* Multistate Sales Tax Guide (CCH) for 1994 ¶ 6-150MO, at 11,531-557. Indeed, in one of the areas stipulated to have a combined county and city sales tax of less than 1.5%, combined taxes have increased to 1.875% since 1990 (Monett in Barry County). *Compare* Record, in Supplemental Legal File, at 27 *with* Multistate Sales Tax Guide (CCH) ¶ 6-150MO, at 11,547.

[8] For one year before it implemented the supplemental use tax, Missouri authorized individual municipalities to enact use taxes. § 144.747. No such local use taxes were enacted apparently because

In 1992, the Missouri legislature established a 1.5% statewide supplemental use tax, thus establishing an overall use tax of 5.725%. § 144.748. In choosing that rate, the legislature considered the fact that more than 90% of in-state taxable sales were taxed by localities at a rate equal to or higher than the use tax rate on interstate sales under section 144.610. (App. 117-18.)

Section 144.748 provides that the revenue generated by the use tax is to be distributed to local jurisdictions in proportion to the amount of local sales tax revenues they receive. Because localities imposing no sales tax receive no such revenues, section 144.748 creates a marginal incentive for counties and municipalities to maintain or increase the sales tax rate. (Pet. App. A-38.)

At the same time, section 144.748 bars localities from supplementing the statewide, uniform use tax. Because the use tax does not vary by local jurisdiction, the out-of-state vendor selling goods for use in Missouri does not have to try to determine which local rates apply to each transaction and then report on its determination in remitting the collected tax to Missouri state officials.

The Parties and Proceedings Below

In 1992, Petitioners Associated Industries of Missouri and Alumax Foils, Inc. brought this action in the Circuit Court for Cole County, Missouri. Although the vast majority (more than 90%) of in-state sales are burdened by a sales tax equal to or greater than the tax imposed by section 144.748 on interstate purchases, Petitioners challenged the constitutionality of the statewide use tax under the Commerce, Equal Protection, and Due Process Clauses of the United States Constitution, as well as provisions of the Missouri Constitution. They argued, *inter alia*, that section 144.748 was unconstitutional be-

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the statute prescribed no specific collection mechanism. This statute has since been repealed.

cause the combined state and local sales tax in "certain areas of Missouri" was lower than the use tax (App. 35). So far as the record reflects, neither Alumax Foils nor any member of Associated Industries resides in a jurisdiction which imposes a combined sales tax lower than the use tax.

Petitioners joined as defendant the State Director of Revenue, charged with administering section 144.748. Respondents Missouri Association of Counties (a not-for-profit corporation representing the interests of 112 Missouri counties), Missouri Municipal League (representing the interests of 540 municipalities), DeLong's, Inc. (a Jefferson City steel fabricating company), City of Blue Springs (a municipality in Jackson County), Associated General Contractors of Missouri (whose members include contractors and others with similar business interests), and Gary Markenson (a taxpayer residing in Jefferson City) intervened. Missouri's municipal and local governments have a direct financial stake in the outcome of the case, for while collection and administration of the use tax is centralized in order to reduce the collection burden, local governments are the beneficiaries of the tax.

The case was presented to the trial court largely on the basis of a stipulated record focusing on sales tax receipts for 1990. The trial court held that section 144.748 is not discriminatory vis-a-vis local sales taxes and that it did not burden interstate commerce. The court found that "intrastate sales in Missouri in calendar year 1990 were subject to a local sales tax burden of approximately $100,000,000 *over* what would have been generated by application of a uniform local sales tax rate of 1.5%," and that "the overwhelmingly predominant local sales tax rates in Missouri will remain at 1.5% or higher for so long as Section 144.748 . . . remains in effect." (Pet. App. A-38.)

The Supreme Court of Missouri affirmed. *Associated Industries of Missouri v. Director of Revenue*, 857 S.W.

2d 182 (Mo. 1993) (*en banc*). In judging the constitutionality of the use tax rate, the court focused on whether there was discrimination against interstate commerce, not particular firms engaging in that commerce: "[W]e must recall that while the commerce clause protects 'interstate commerce', it does not require identical treatment of all taxpayers." *Id.* at 192.

Because more than 90% of the in-state sales were subject to a tax burden equal to or greater than the tax burden on out-of-state purchases, and intrastate sales bore a *greater* tax burden than they would have had they been subjected to a uniform rate equal to that of the use tax, the court held that the "tax was designed, and apparently works, to avoid discrimination on a statewide basis." *Id.* at 191. Because the case involved a complementary tax on interstate transactions "[i]n a state where a permissive system of local sales tax is allowed," the court invoked *General American Tank Car Corp. v. Day*, 270 U.S. 367 (1926), and concluded that section 144.748 does not discriminate against interstate commerce "in purpose or practical effect." *Id.* at 192.

This Court granted certiorari.

SUMMARY OF ARGUMENT

This case presents a practical issue of state and local taxation arising out of Missouri's imposition of a uniform use tax on goods purchased out-of-state to complement the state and local sales taxes imposed on in-state purchases. Because of the delegation of taxing authority to local governments, sales taxes vary within the state. It is impossible for a single statewide use tax rate simultaneously to "equal" all of the varied sales tax rates set at a local level. In such circumstances, this Court has required that the constitutionality of the statewide rate on interstate transactions be tested against the average local rate. *See General American*, 270 U.S. 367; *Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364 (1902). The rate established by the legislature here clearly satisfies the

Court's mandate: More than 90% of in-state sales were taxed at a rate equal to or higher than the state's use tax; and the burden on intrastate sales was $100,000,000 greater than it would have been had the use tax rate been applied to such sales. If anything, Missouri's sales tax-use tax structure treats interstate commerce *more* favorably than intrastate commerce.

Missouri's use tax does not by its purpose, on its face, or in its effect, discriminate against interstate commerce. Where the varying rates applicable to in-state transactions are a function of local legislative decisions, there can be no suggestion of a purposeful effort on the part of the state to engage in economic protectionism. Use of the average in-state rate as a point of reference ensures that the rate applied to interstate commerce does not disproportionately or unduly burden interstate commerce overall or any segment of that commerce, such as a particular industry or business. Alternative methods of setting a rate for a complementary use tax, designed to obtain what Petitioners might view as more perfect "equality" between intrastate and interstate commerce, stand on no firmer constitutional footing than the method employed by the Missouri legislature, the court below, and this Court in *General American*.

The *General American* approach to the problem of assuring even-handed treatment for interstate commerce where a complementary tax must respond to *varying* local tax rates has not been undermined by later cases. The cases cited by Petitioners all involved a net burden on interstate commerce. In addition, in each of those cases the discrimination was the product of a clearly drawn and prejudicial provision of law that squarely benefitted in-state interests, on the one side, over interstate commerce, on the other. By contrast, Missouri's sales tax-use tax structure and the rate chosen by the state create a classification under which most *interstate* purchases are treated as well as or more favorably than intrastate purchases,

and intrastate purchases as a class bear a disproportionate tax burden. In contrast to the cases relied upon by Petitioners, the structure of the tax here—where the asserted unevenness of in-state rates is merely the product of varying local rates—suggests no purposeful effort to benefit in-state interests or some particular in-state industry. Neither interstate commerce generally, nor any identifiable segment of that commerce, is discouraged.

Petitioners' assertion that interstate transactions must be taxed at a rate as low as that applicable to "each" in-state sale is in essence an argument that the Commerce Clause requires some sort of "most favored taxpayer treatment." This Court's cases, however, have not focused on particularized inequities claimed by specific firms doing interstate business. Rather, they focus on whether there is evidence of invidious economic protectionism or discrimination against *interstate commerce*. What is therefore demanded by the Court's cases is that in-state industry not be singled out for protection and interstate commerce not be unduly burdened; that no benefits be made available to in-state industry but denied interstate commerce; and that there be no adversely disproportionate impact on interstate commerce. All these demands are met in this case.

In the narrow circumstance represented by a state's effort to treat interstate commerce fairly and equally through a complementary tax when local rates vary, the state does not discriminate against interstate commerce when it sets the rate imposed on interstate purchases at a level equal to or lower than the average rate imposed on in-state sales. *General American* is fully consistent with this Court's commerce clause cases.

ARGUMENT

I. UNDER THE CASES OF THIS COURT, MISSOURI'S COMPLEMENTARY USE TAX RAISES NO INFERENCE OF ECONOMIC PROTECTIONISM OR DISCRIMINATION AGAINST INTERSTATE COMMERCE

1. The Commerce Clause was intended to prevent balkanization of, and economic warfare between, the states. Although the Commerce Clause does not eclipse the "power of the States to tax for the support of their own governments," (*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 87 (1824)), the Clause limits a state's power to levy certain kinds of taxes. The form of interstate economic warfare with which the Framers were most concerned was protectionist tariffs directed against interstate commerce for the protection of local economic interests. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

While protectionism is clearly proscribed, the Clause does not immunize interstate activity from state taxation. To the contrary, a state has compelling interest in insisting that interstate activity bear a fair and just proportion of the state's tax burden. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24 (1981).

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Court described a four-part test intended to ensure that interstate transactions bear a fair proportion of state taxes, but no more. The requirement of *Complete Auto Transit* with the longest lineage is perhaps the prohibition on taxes which discriminate against interstate commerce.[9] The antidiscrimination principle stands as a bar against economic protectionism and state "taxes that pass an *unfair* share of the tax bur-

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[9] This Court has recognized and applied the anti-discrimination principle since at least 1875. *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280 (1875).

den onto interstate commerce." *Quill Corp. v. North Dakota*, —— U.S. ——, 112 S. Ct. 1904, 1913 (1992) (emphasis added). Petitioners' only claim in this case is that Missouri's use tax violates the prohibition on discrimination against interstate commerce.

2. Although the Court has consistently *dis*approved discriminatory taxes, the Court has just as consistently approved taxes directed at interstate commerce but designed merely to complement taxes imposed on comparable in-state events. A complementary tax is a levy on interstate transactions designed to match a specific, substantially equivalent levy on intrastate transactions. It thus *equalizes* the tax burden between *intra* and *inter*state transactions.[10]

The constitutional rationale for "complementary" taxation is plain. States face practical difficulties in levying taxes on matters with an interstate component. Thus, levies imposed in connection with interstate transactions must often take a form different from those imposed in connection with intrastate transactions. Because the tax cannot be the same, the state must develop fair equivalents in equalizing the burden as between interstate and intrastate transactions—at least if it is to ensure that *both* intrastate and interstate transactions pay their fair share.[11] The basic principle of complemenary taxation

[10] The CEO of Respondent DeLong's, Inc., a Jefferson City steel fabricator of bridges, testified that the company's sales from Jefferson City are subject to a 2% local sales tax, that all of its competitors except one are located out of state, that the margin of profit for steel fabricators nationwide is 1.8%, and that the lack of a local use tax on fabricated steel from out of state had placed DeLong's at a competitive disadvantage. App. 93-99.

[11] If circumstances were such that the state could readily impose the same tax on the interstate transaction as it imposed on the intrastate, there might be no need for a complementary—i.e. different but equivalent—form of taxation. *See* Hellerstein, *Complementary Taxes As A Defense To Unconstitutional State Tax Discrimination*, 39 Tax Law. 405, 407 (1986) ("The state overcomes the constitutional hurdle of taxing an out-of-state or interstate sale by imposing the tax on a subject within its taxing power—the use, storage, or consumption of property within the state").

therefore represents an acceptance of the fact that the tax on interstate transactions cannot be precisely the same as the intrastate tax, but may approximate that tax in a way that satisfies basic commerce clause concerns.

For example, in *Hinson v. Lott*, 75 U.S. (8 Wall.) 148 (1869), the Court considered a tax on liquor brought into the state for sale. Standing alone, such a tax would appear to single out interstate transactions. However, an identical tax was imposed on liquor manufactured in the state. Although the two taxes were imposed at different points in the distribution chain—one on the *distiller* and the other on the *dealer*—the Court held that the distinction was not constitutionally significant in light of the overall purpose of obtaining revenue from the sale of all liquors:

> [W]hereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State.

75 U.S. (8 Wall.) at 153.

Complementary taxes must, of course, address "substantially equivalent events." *See Maryland v. Louisiana*, 451 U.S. 725, 759 (1981). It is largely through this requirement that the Court ensures a true "apples to apples" comparison. By insisting that the tax burden falls on interstate and intrastate businesses and transactions in a "substantially" similar way, the courts ensure that particular out-of-state businesses or industries have not been

competitively disadvantaged in relation to in-state competitors.[12]

3. At one level, a complementary tax simply ensures that interstate commerce bears its just share of the tax burden—specifically, a burden equivalent to that borne by similar, wholly in-state transactions or events. It thus permits a state to raise proportionate revenues from interstate transactions, and thwarts attempts to avoid or evade a state tax burden by conducting business across state lines. As this Court held in *Complete Auto Transit*, it "was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." 430 U.S. at 288 (quoting *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

At the same time, a complementary tax "protects" in-state businesses from being forced to bear a *disproportionate* share of the tax burden, resulting in a competitive disadvantage. It does this by erasing any "tax incentive to engage in interstate commerce instead of intrastate commerce." *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 243 (1987).

4. So long as the complementary tax structure addresses substantially equivalent events, and results in "substantially even-handed treatment" for interstate commerce (*Boston Stock Exch.*, 429 U.S. at 332), it raises no commerce clause concerns. A complementary tax

[12] To provide the assurance that the state is not burdening interstate commerce in a materially *different* way than it burdens in-state commerce, the comparison must be between two similar taxes which tax substantially equivalent things, both within the state's power to tax. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *Scheiner*, the Court held that even though in-state and interstate drivers were taxed at the same flat rate, the privilege of using the state's roads was decidedly more valuable to in-state drivers. *Id.* at 296.

goes beyond permissible bounds, however, if it "affirmatively places interstate commerce at a disadvantage." *Tyler Pipe Industries*, 483 U.S. at 243. That is, it "violates the Commerce Clause 'when it unfairly burdens commerce by exacting more than a just share from the interstate activity.'" *Id.* at 247 (quoting *Washington Dep't of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978).

5. The "paradigm" of permissible complementary taxation involves taxes on sales within the state, and complementary use taxes on the privilege of using goods purchased out-of-state.[13] *See Williams v. Vermont*, 472 U.S. 14, 24 (1985) ("A use tax is generally perceived as a necessary complement to the sales tax"). Such complementary use and sales taxes were first approved by this Court in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937), and many cases have since echoed this approval. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Nat'l Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (1977). The sales tax and use tax focus on substantially equivalent events; each applies only once to any purchase; each is assessed on the purchase price; and each taxes, in essence, the consumption of goods.[14] Accordingly, "the constitutional-

[13] As Professor Hellerstein has summarized, the sales-tax relationship was consciously created to address a troublesome gap in the sales tax structure attributable to the constitutional strictures prohibiting states from taxing sales consummated outside their borders or in interstate commerce. Because this gap threatened the states with a loss of revenue and local business, they "enacted 'complementary' use taxes." Hellerstein, *Complementary Taxes*, 39 Tax Law. at 406-07.

[14] Petitioners do not deny that the use tax and sales tax here are complementary in the sense that they tax "substantially equivalent" events or activities. *See Maryland v. Louisiana*, 451 U.S. 725, 758-59 (1981). "Compensating use taxes are functionally equivalent to sales taxes" in that both appear to tax the privilege of use or consumption. *See* Hellerstein, *Complementary Taxes*, 39 Tax Law. at 407.

ity of such state [compensatory use tax] schemes is settled." *Nat'l Geographic Society*, 430 U.S. at 555.

6. The complementary sales tax-use tax structure serves two "customary rationale[s]." *Williams v. Vermont*, 472 U.S. at 24.

First, collecting revenue from transactions with some interstate component, which would otherwise escape taxation, is a justifiable, non-protectionist end in itself. *See Ass'n of Washington Stevedoring Cos.*, 435 U.S. at 748 ("[a] State has a significant interest in exacting from interstate commerce its fair share of the cost of state government"). The use tax-sales tax structure thus compensates "the State for revenue lost when residents purchase out-of-state goods for use within the State." *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 32 (1988).

Second, the compensatory tax structure protects in-state sellers from the possible loss of business which attends the state's imposition of a sales tax on local purchases. *Silas Mason Co.*, 300 U.S. at 583-85; *Maryland v. Louisiana*, 451 U.S. at 758-59. In other words, the complementary tax eliminates an unfair *advantage* that purchasers in interstate commerce would otherwise enjoy, and merely implements the long recognized principle that "[e]ven interstate business must pay its way." *Western Livestock*, 303 U.S. at 254 (quoting *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259 (1919)). Although the compensating tax therefore "protects" local business, it is not "protectionist" in a prohibited sense because "equality and not preference is the end . . . achieved." *Silas Mason*, 300 U.S. at 586.

The Court's repeated acknowledgment that these two purposes are legitimate disposes entirely of Petitioners' suggestion that the protection afforded by the tax here renders it unconstitutional. *See* Pet. Br. at 15. Every complementary tax affords protection. The protection afforded local businesses by a complementary tax, however, is merely a protection from disproportionate economic burdens; it reflects the elimination of a special *benefit* (in the form of escape from comparable tax burdens) which would otherwise be available to businesses engaged in interstate transactions. *See Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 340, 349 (1944) (gross receipts tax on interstate transactions constitutional where denial of the power to levy such a tax "would be to make local industry suffer a competitive disadvantage"). That is far different from protecting local businesses from the travails of ordinary competition from interstate competitors, the protectionism barred by the Commerce Clause.

7. Equally fundamental to the states is their prerogative to allow subordinate local government bodies—counties, towns, municipalities, taxing districts—to impose taxes as the state deems necessary and expedient. *E.g., Columbus Southern Ry. Co. v. Wright*, 151 U.S. 470 (1894). Specifically, many states authorize local governments to impose sales taxes, often along with state-imposed sales taxes.

When local governments have independent authority to levy sales taxes, sales tax rates will necessarily vary *within* the state, depending upon where in the state—*i.e.*, in which taxing jurisdiction—the sale takes place. These variations in rates of local taxation are an accepted feature of state taxation, necessitated by local conditions and reflecting important political and economic choices. Petitioners would certainly not wish to question directly the principle that sales taxes may be set by local governments to meet local conditions and thus may vary within the state. But (as shown below) Petitioners' argument could seriously undermine a state's ability to maintain local authority over sales tax rates.

8. In addressing issues of complementary taxation, the Court has taken a practical approach to variations in the *intra*state rate produced by the delegation of taxing

authority to local governments. On the one hand, the need to impose a complementary tax—to counterbalance the potential loss of tax revenue, to guard against an unfair advantage to interstate commerce, and to ensure that interstate commerce bears a fair share of the tax burden —remains the same whether the tax is imposed at the state or the local level. On the other hand, there is an obvious difficulty (or, more accurately, an impossibility) in employing the "same" rate on one side of the equation (the state-imposed side of the complementary tax) if the rate *varies* on the other side (the locally-imposed side) of the equation.

Because a single statewide complementary rate applicable to interstate transactions cannot at the same time, and in a literal sense, *match* all the varying local rates, the Court has permitted a proxy for that match by looking to the *average* rate applied within the state to intrastate transactions. The Court has thus insisted that the tax applied to interstate transactions not discriminate against interstate commerce. Specifically, the Court has addressed the practical problem of varying local rates by focusing on the relative *overall* burden of the tax on interstate and intrastate commerce. Consistent with its approach to complementary taxes generally,[15] the Court has *not* tried to impose an abstract notion of equality and *sameness* that is, by virtue of the very fact of internal variation, impossible to achieve.

In *General American Tank Car Corp. v. Day*, 270 U.S. 367, 372 (1926), the Court considered whether there was an "unconstitutional burden on interstate commerce" in connection with varying local rates applicable

[15] The problem presented by this case is similar to the problem presented by complementary taxes in general: Because the tax on the interstate transaction can never be the *same* as it is on the intrastate transaction, the state must employ a proxy. The proxy employed in this context involves use of the average in-state rate as the measure of the permissible rate applicable to interstate transactions.

to residents and a statewide rate imposed on non-residents. Louisiana taxed the rolling stock of non-resident corporations at 25 mills, while the rolling stock of resident corporations was taxed at varying rates, depending on the parish and any municipality involved.

The most salient feature of the tax structure was, of course, that in "some parishes, local taxes exceed twenty-five mills [the tax imposed on the non-resident corporations], *and in others they are less than that amount. . . .*" 270 U.S. at 371 (emphasis added). This fact did not render the tax unconstitutional. Rather, in light of the impossibility of establishing a statewide tax rate which would "equal" all of the varying locally-based rates, the Court necessarily focused on whether the *average* rate paid by state residents was less or more than the rate imposed on non-residents and thus whether interstate commerce was disproportionately burdened by the tax.

This focus comports with the historic underpinnings of the Commerce Clause. The Clause "protects the interstate market, not particular interstate firms" (*Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 127 (1978)), from burdensome taxes. Absent a disparate burden on interstate transactions—or some way in which the state tax systematically favored in-state transactions or citizens —the system could not be said to discriminate against a class of interstate interests or favor a class of in-state interests. Absent some overall or net benefit to in-state businesses or industries at the expense of interstate commerce, it would be equally difficult to describe the rate established by the state as embodying the kind of economic protectionism with which the Commerce Clause is concerned.

In *General American*, the Court went on to suggest that the problem presented by varying local tax rates might be accommodated still further, explaining that in the absence of (1) a purpose to discriminate, or (2) some aspect of the scheme which made disproportionate

impact on interstate commerce "a necessary or continuing result of the scheme of taxation adopted," a temporary imbalance in one year caused by the rates ultimately set at a local level, might still pass constitutional muster.[16] 270 U.S. at 373. "[I]n such a scheme of complementary tax statutes, however fairly devised, it would be impossible to provide in advance against occasional inequalities as great as that here complained of." *Id.* at 374.[17]

Silas Mason, the case first approving complementary use taxes, relied upon *General American* as illustrating the absence of discrimination in a complementary tax structure. 300 U.S. at 585. Petitioners point out that as the Court framed the issues in *General American*, commerce clause concerns were held to be satisfied by the fact that the tax imposed on non-resident corporations was part of a complementary plan (270 U.S. at 372); "discrimination" was the focus of the equal protection analysis.

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[16] The Court went on to find that Appellant had failed to support its factual contention of discrimination even in that one year. The record did not "show the amount of the variation in the rate of local taxation [or] its average throughout the State." *General American*, 270 U.S. at 374. The record detailed tax rates in various parishes, but did not show variations *within* the parishes.

[17] This second aspect of *General American*—addressing an aberrational situation in which interstate commerce turned out to be disproportionately burdened in a given year, notwithstanding the establishment of a statewide rate not designed to produce that result—is obviously not at issue in this case.

Petitioners' *amicus*, Washington Legal Foundation, suggests that the defect in the use tax in the instant case is that it does not "guarantee" that sales taxes will not be exceeded by the use tax in some future year. Amicus Br. at 6. The court below found as fact that this was unlikely. (Pet. App. A-38.) Moreover, this Court does not ordinarily judge the constitutionality of state laws based on the possibility that in the future the laws might change. It suffices here that the current rate is not discriminatory and does not unduly burden interstate commerce.

But the question whether there exists discrimination *against interstate commerce* or non-residents is essentially the same under either constitutional provision: there is no discrimination against *interstate commerce* unless the classification at issue can fairly be said to have burdened that commerce, or some identifiable part thereof, more than local business. If the mere fact that *some* local jurisdictions charged rates lower than the rate of taxation imposed on interstate transactions presented a significant commerce clause concern, the tax at issue in *General American* could not have been sustained.[18]

In an earlier case, *Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364 (1902), the Court addressed a similar issue. That case involved varying locally assessed stock taxes imposed on in-state residents, on the one hand, and a statewide rate and assessment method imposed on non-residents, on the other. The focus of the court below was on whether, as a whole or on average, non-residents were being asked to assume a disproportionate share of the tax burden:

> [T]he claim that in this case the inequality operates against non-residents or citizens of other States as a class is unfounded. . . . The average rate of taxation for municipal purposes for the 168 towns approximates fifteen mills, which is the rate for the special tax imposed in respect to non-resident shares; *but the average rate for municipal taxation in the ten larger towns (representing much more than half the grand list of the State) is about twenty-one mills.* The clear purpose of the legislature in fixing the mode of valuation for the property subject to a single rate for special taxation and the valuation for the property subject to widely varying rates for municipal taxation, was to approximate a general equality in the burden that should fall on the two classes of property; and it well may be that the rule objected to in respect

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[18] *See infra* at 32-38.

> to the valuation of the interests of resident shareholders in corporations investing in taxable land still leaves, as a whole, a lighter burden of contribution resting upon non-resident shareholders.

Id. at 367-68 (emphasis added). Thus, particular emphasis was laid on the fact that *in the most populous jurisdictions the rate was far in excess of the rate applicable to non-residents. Id.* Although *some* local tax rates were lower than the tax on non-residents, the rate chosen by the state did not discriminate against non-residents "as a class."

Therefore, in *Travellers'*, the Court judged the tax structure in light of the practical problem of attaining something that could be regarded as "equal" where the tax had to be "equal" to a number of different rates. The Court held that the constitutional mandate was satisfied by the state legislature's effort to "apportion fairly the burden of taxes between the resident and the non-resident." *Id.* at 369. Thus:

> While there may result from year to year a variance in the amount of the burden actually cast upon non-residents as compared with that cast upon residents, yet it is also true that a *like inequality will exist between residents of different localities in the State by reason of the different rates of taxation in those localities. You cannot put one resident against one non-resident stockholder and by a comparison of their different burdens determine the validity of the legislation any more than you can place a stockholder resident in another municipality, and by comparison of their different burdens determine the validity of the tax law in respect to resident stockholders.*

Id. (emphasis added).

To be sure, this discussion in *Travellers'* was in the context of the Privileges and Immunities Clause, rather than the Commerce Clause. The standard under both clauses is sufficiently similar to warrant analogy. *See*

Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978) (noting "the mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause—a relationship that stems from their common origin . . . and their shared vision of federalism").[19] But under whatever provision of the Constitution those cases were decided, *Travellers'* and *General American* illustrate the practical problem in trying to impose "equality" between a statewide use tax and varying local tax rates. In these circumstances, comparisons between the tax imposed on one interstate and one intrastate transaction cannot reveal discrimination against interstate commerce generally because the same disparities (or greater disparities) are found *within* intrastate commerce. *Id.* The solution thus lies in employing an average in-state rate as the basis of comparison rather than in pursuit of a notion of "absolute equality" which cannot be attained.

9. *General American* and *Travellers'* squarely reject what we understand to be Petitioners' most extreme formulations—either (1) that a statewide compensating use tax is invalid if the sales tax rate anywhere within the state is lower than the use tax; or possibly (2) that sales taxes imposed at a local level cannot be the subject of a compensating tax imposed statewide.[20] Pet. Br. at 22-27. As

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[19] *Cf. Austin v. New Hampshire*, 420 U.S. 656, 661-65 (1975) (discussing *Travellers'* and the standard of "substantial equality of treatment" to be applied under Privileges and Immunity Clause); *Toomer v. Witsell*, 334 U.S. 385 (1948) (higher license fee on nonresident than that on resident shrimp boat owners); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (higher fee on nonresident than resident commercial fisherman); *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208 (1984) (Privileges and Immunity Clause applies to laws that discriminate on the basis of municipal as well as state citizenship).

[20] Aside from *General American's* direct rejection of this last theory, it makes little sense as a constitutional or practical matter. *See* J. Hellerstein and W. Hellerstein, *State Taxation*, § 4.12[2][a] (1993) ("the Court can readily take into account the interrelations of such levies as sales and use taxes [imposed at a local level]

Petitioners (and their *amicus*) would have it, the asserted requirement of "absolute equality," Amicus Br. at 8-15, would mean that a use tax imposed on out-of-state purchases for goods used within the state, would discriminate against out-of-state sellers if *any* in-state sales were subject to a lower sales tax. That the area with the lower rate may be 300 miles across the state, or that the rate prevails only in areas with sparse population, little industry or commercial activity, would have no effect on the outcome under the "bright line test" described variously by *amicus* as "absolute equality" or "equality in each and every instance." *Id.* The insistence on a perfect match between interstate transactions and intrastate transactions was rejected in *General American* and *Travellers'*.

10. Under Petitioners' view, Missouri would either have to (1) withdraw from it's subdivisions the right to impose sales taxes at a local level to meet local needs, and instead adopt a uniform rate to allow the use tax in all instances to match the sales tax; or (2) set the statewide use tax at the *lowest* rate available anywhere in the state.

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growing out of the same purchase and sale"). If a county or municipality established a special tax directed *against* interstate transactions, the Court would plainly invalidate the tax, even though it is not applied statewide. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, —— U.S. ——, 112 S.Ct. 2019 (1992). Thus, local taxes can *violate* the Commerce Clause. There is no reason they cannot provide a justification for a statewide tax on interstate commerce. The need for a complementary use tax to ensure a fair burden on interstate commerce is the same whether the sales tax is imposed statewide or locally. The state is free to authorize subordinate government units to levy taxes as it sees fit. The state, of course, bears the ultimate responsibility for such taxes under the Commerce Clause.

If Petitioners' theory is that if the sales tax is imposed at a local level, the use tax must also be imposed locally, suffice it that this theory too is inconsistent with *General American*, and we are unaware of any rule which would bar a state from dealing with a problem of interstate commerce on a statewide basis.

The first alternative would mean a fundamental change in the powers of local government under state law. The Commerce Clause ought not be the vehicle for requiring a major reallocation and change in the state's internal political structure or its taxing system.[21] *See Williams v. Vermont*, 472 U.S. at 22 ("[T]he States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. . . [The Court] has been reluctant to interfere with legislative policy decisions in this area") (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)).

The second alternative demonstrates that the Petitioners have failed to grasp the purpose of, and constitutional foundation for, complementary use taxes. Setting the use tax rate at the *lowest* rate available in the state would frustrate the central objectives of a compensating use tax: providing the state with comparable revenue for the in-state consumption of goods wherever the goods were acquired and alleviating the prejudice to local business caused by allowing purchasers to escape the consumption tax burden by purchasing out-of-state. The Commerce Clause was not intended to exempt taxpayers from paying their fair share of a state's tax burden merely because they shop in interstate commerce. *See Complete Auto Transit, supra.*

If most of the citizens of the state were taxed at a rate of 5% for the privilege of using goods purchased within the state, and persons who purchased the same goods out-of-state were taxed at only 2% for the privilege of use (because one municipality within the state imposed

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[21] The prerogative of county and municipal governments to set tax rates at levels to meet local needs is an important one. Different localities have different needs and the flexibility to meet those needs through the imposition of local taxes, geared to local conditions, is important.

only a 2% tax for the privilege of use of the goods purchased in that jurisdiction), then few would doubt that out-of-state sellers were better off and less burdened than their in-state counterparts. Nor would one doubt that the tax favored interstate commerce. Yet, that is the form of "equality" which Petitioners seek to impose.

In the context of taxes which concededly meet the basic criteria for complementary taxation, forcing states to fundamentally change their internal tax structure in order to effect a more perfect match with the tax on interstate transactions would allow the tail to wag the dog. Indeed, this Court's acceptance of the basic principle of complementary taxation belies any suggestion that the Commerce Clause mandates such fundamental changes in the state's internal tax structure.[22] To the contrary, the *premise* of complementary taxes is that a literal match is unattainable and a perfect match is unnecessary so long as the state chooses a proxy which imposes a tax on "substantially equivalent" events and a comparable burden on in-state and out-of-state commerce. So long as substantial equivalence is achieved, the state is permitted to satisfy its own compelling need to obtain revenue from interstate commerce and "equalize" the tax burden between interstate and intrastate commerce. Petitioners' ar-

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[22] If such changes were constitutionally required, a state which imposed a use tax in connection with interstate commerce would presumably be required to impose a use tax, rather than a sales tax, on in-state sales so that an exact match with the tax on interstate sales could be achieved. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76-77 (1963) (Brennan, J., concurring) (describing differences between use sales taxes). *See also Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 153 (tax need not be imposed directly on the same party in the chain of distribution; state is entitled to choose the most "expedient" in-state tax (on the distiller) and develop an equivalent tax for the out-of-state transaction (on the distributor)); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 478-82 (1932) (taxes on in-state "dealers" and "importers" of interstate goods are complementary).

gument for equality in each and every instance would extend this Court's commerce clause jurisprudence far beyond where it has been extended before.[23]

11. At bottom, Petitioners would simply ignore the fact that most transactions (more than 93%) within the state are subject to an equal or higher rate of taxation than the tax imposed in connection with interstate transactions. *Cf. Tradesmens Nat'l Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940) ("Discrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations"). More centrally, Petitioners' approach ignores what ought to be the principal concern in any inquiry about whether a complementary tax scheme actually discriminates against interstate commerce: Whether there is, in fact, some line drawn by the state, or some disparate burden imposed on interstate commerce, that favors (or perhaps demonstrates an intention to favor) local interests at the expense of out-of-state interests. Where the average burden of the sales tax-use tax structure falls *more* heavily on intrastate transactions, it is difficult to describe the scheme as evincing unconstitutional discrimination against interstate commerce, either in purpose or effect. *Cf. Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) (state taxes which favor out-of-state commerce are not constitutionally suspect under the Equal Protection Clause). The tax structure here does not discriminate against interstate commerce generally or any definable segment of that commerce or industry.

12. There is no constitutionally "fairer" way to evaluate the interstate tax than that employed by this Court in *General American* and *Travellers'* and followed by the court below. For example, Petitioners hint that the use

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[23] *See infra* at 32-38.

tax might vary with, or be measured against, the sales tax applicable at the principal place of business of the firm making an interstate purchase. That approach would not yield any more constitutionally satisfying result.

Notably, Petitioners do not press that approach. Petitioner Alumax is not headquartered (*see* App. 6) in a jurisdiction where the sales tax is lower than the use tax.[24] Thus, having the use tax match the rate in effect at the place of residence would not aid Petitioners. Petitioners have no standing to argue the interests of businesses which operate in jurisdictions where lower rates prevail and which (under the "tax rate of residence" scenario) would benefit from a constitutional rule that the use tax must reflect the sales tax in effect at the place of residence.[25]

Indeed, imposition of a "sales tax rate of residence" scheme in Missouri would result in *higher* use tax rates in connection with most interstate transactions, a *greater* tax burden on interstate commerce generally, and a *greater* burden on most (and perhaps all) taxpayers engaging in interstate commerce. Moreover, the constitutional *remedy* in this case under such a theory would simply be to require a partial refund of use taxes to those businesses located where the use tax is higher than the sales tax—in order to restore the match between the sales tax at the place of residence and the statewide use tax.

But considering "the tax rate of residence" approach as simply one of the alternative, permissible methods of

[24] Neither is that fact coincidental. Higher rates tend to prevail where the need for government revenue is great because of dense population or the need to maintain significant infrastructure—in short, the very things that would tend to cause industry to locate in a particular area.

[25] The effect on out-of-state sellers (whose interest Petitioners assert) is essentially the same under either scenario. *See infra* at 36-37.

taxation that might be available to the state, it is not a method of avoiding discrimination against interstate commerce superior to that employed here. Place of residence is of little direct value in evaluating sales tax burdens.[26] The applicable sales tax rate is the rate prevailing at the place of the sale, *not* the place of residence.[27] Thus, one can readily obtain a lower sales tax rate by travelling to a place where a lower tax prevails.[28] In this way, the "sales tax of residence" approach fails to provide the one assurance that is available through the method of analysis applied by the court below: that interstate transactions as a whole bear their fair share, *but no more than their fair share,* of the state's tax burden.

Moreover, having the use tax vary with the sales tax applied at the place of residence raises a number of practical problems. The use tax is generally collected by the out-of-state vendor. If the rate were to vary depending upon the place of use or the purchaser's place of business, the vendor would have to rely on the purchaser for accurate information.[29] Based on that information, the

[26] As the court below correctly pointed out, "residents of one county may travel to another for tax advantage purchases. Depending upon the actual tax rates, demographics and purchasing patterns, they might even result in greater discrepancies." 857 S.W.2d 182, 192 (Mo. 1993) (*en banc*).

[27] A sales tax is imposed at the point of sale, allowing its collection at a single fixed rate by the seller as part of its customary and required way of doing business. It is not surprising that where a state has a choice, it will prefer to employ a *sales* tax, rather than a use tax. *See* Hellerstein, *State Tax Discrimination Against Out-of-Staters*, 30 Nat. Tax J. 113, 118 (1977).

[28] In view of the difficulties created by using place of residence to determine the applicable use tax, one state court has declared such a system unconstitutional. *American Modulars Corp. v. Lindley*, 54 Ohio St.2d 273, 376 N.E.2d 575, *cert. denied*, 439 U.S. 911 (1978).

[29] Any system of taxation which relies upon the purchaser to provide the information which will determine which tax rate will apply is ripe for evasion.

vendor would try to determine a current applicable rate from more than a thousand of Missouri's taxing "areas." Because these rates change, the out-of-state vendors' Missouri tax charts would have to be frequently revised.[30] The vendor would necessarily be burdened further by individually reporting on the applicable rate in remitting the tax to state authorities. In order to reduce tax evasion and the burdens associated with using place of residence (which varies with each transaction), sales taxes are imposed based on place of sale, rather than the purchaser's residence. Having established such a convenient standard for in-state sellers, it would make little sense to impose onerous chores on *out-of-state* sellers who have the misfortune to sell to Missouri purchasers. *See generally National Bellas Hess, Inc. v. Dep't of Revenue of Illinois*, 386 U.S. 753, 759-60 (1967).[31]

13. Petitioners make much of the median or average rate, noting that in more than 50% of the state's taxing *jurisdictions*, the sales tax is lower than the use tax. *See* Pet. Br. at 4; Cert. Pet. Question 1. We have pointed out that Petitioners' use of the term "taxing jurisdictions" is somewhat misleading inasmuch as many of the "jurisdictions" are simply unincorporated locales and do not in fact have taxing authority. *See Counterstatement of Facts, supra*, at 3. But holding aside those difficulties, it is entirely artificial to count up the taxing jurisdictions and then ascribe to each of them an equal voice, regardless of

[30] There are few short-cuts to identifying the applicable rate. Rates may vary even within a particular zip-code, with some areas in the zip-code within one incorporated area, a second within another, and a third in an unincorporated area with only a county tax.

[31] We do not suggest that a place of residence approach would violate the Commerce Clause—it would likely meet the standard of "substantial equivalence" between the treatment of in-state and interstate transactions. But the "sales tax of residence" approach ought not be required to displace the alternative—squarely grounded in this Court's cases—employed by the state in this case.

population or the number and financial significance of transactions actually subject to each rate. *Cf. Travellers'*, 185 U.S. at 368.

Modern commerce clause analysis focuses on the "practical effect" of a challenged tax. *Complete Auto Transit*, 430 U.S. at 279. The court below was attentive to that direction. To ensure that goods used in the state, though acquired outside the state, bore a fair share of the tax burden, but no more than a fair share, the court focused on the sales tax burden on in-state transactions as the market actually operates. 857 S.W.2d at 192. The court thus looked to the number of sales subject to each rate, and not an abstract average of the prevailing rates in the various jurisdictions, to determine the comparative burden of the tax on in-state and interstate transactions.[32] *Id.* at 191.

Specifically, the court noted that only "6.86% of in-state sales in 1990 were made in localities where the interstate use tax rate would have been *higher than* the intrastate sales tax rate. . . ." *Id.* (emphasis added). In-state sales bore a far greater tax burden than interstate sales. Indeed, employing the *use tax rate* to *intrastate* transactions (instead of the sales tax rate) would have *reduced* the taxes imposed on in-state business by $100,000,000. *Id.* at 185. These facts refuted any suggestion that the sales/use tax structure favored in-state interests over interstate interests. When "combined with the fact that 93.14% of the 1990 sales would have resulted in use

[32] The analysis of the court below generally tracks this Court's tack in *Travellers'*, where the Court took special note of the *higher* in-state rates prevailing in the largest local jurisdictions. 185 U.S. at 368. *General American* did focus on the average among taxing jurisdictions. But if the parties and the Court had possessed information about the value of property actually subject to each of the rates, it is difficult to believe that it would have disregarded that information in favor of an unweighted average of the rate charged in each local jurisdiction.

taxes either at the same or at lower rates than the complementary sales tax, it is apparent that the tax was designed, and apparently works, *to avoid* discrimination on a statewide basis." *Id.* at 191 (emphasis added).

Given the basic difficulty in impressing a fair and equal share of a consumption tax burden on interstate purchases when sales tax rates vary within the state, there may be some room for debate about the *best* way for the state to proceed. Here, Missouri has selected a rate which is in line with this Court's precedents and far from the margin. Comparing the use tax with the average of the sales tax imposed on all in-state purchases, it is plain that the overall burden of Missouri's tax structure falls more heavily on intrastate than interstate transactions. *Interstate transactions* "as a class" (*Travellers'*, 185 U.S. at 367-68) have not been discriminated against. Nor is the rate (or the overall system) otherwise suggestive of the kind of economic protectionism which the Commerce Clause proscribes. In every respect, the sales-use tax structure adopted by the state exemplifies the "substantially even-handed treatment" for interstate commerce (*Boston Stock Exch.*, 429 U.S. at 332) which the Commerce Clause requires in a compensating tax, while allowing the state to obtain the revenue it is due on goods consumed in the state but purchased outside.

II. THE APPROACH TO EQUALITY OF TREATMENT IN CONNECTION WITH VARYING LOCAL TAX RATES OUTLINED IN *GENERAL AMERICAN* HAS NOT BEEN UNDERMINED BY SUBSEQUENT AUTHORITY

1. Petitioners largely concede that the rule of "absolute equality" which they advocate is inconsistent with the approach to the problem of varying local tax rates reflected in *General American*. They urge that *General American* be overruled as inconsistent with *Halliburton*, 373 U.S. 64, *Maryland v. Louisiana*, 451 U.S. 725, and

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), all of which discuss the principle of equality which is the hallmark of any compensatory tax. Specifically, they argue that *Halliburton* (and the other cases cited) do not admit of an exception for *de minimis* or incidental discrimination. *See* Pet. Br. at 26. We agree. But it has little to do with this case.

2. This case does not ~~involve either *de minimis* or~~ *incidental* discrimination.[33] Missouri's tax structure does not discriminate against interstate commerce at all—at least in any sense previously defined by this Court. In contrast, each of the cases cited by the Petitioners involved a clear (though sometimes small) discriminatory impact on interstate commerce. In each instance, the challenged tax law treated out-of-state transactions *less* favorably than otherwise similar in-state transactions.[34] In *Halli-*

[33] One difficulty with Petitioners' argument arises at the level of precedent. The equality principle did not originate with *Halliburton*. Rather *Halliburton* drew directly from *Silas Mason*. *Silas Mason* expressly relied upon *General American* as illustrating the principle of equality that the Court was adopting. *Silas Mason*, 300 U.S. at 585.

Moreover, *General American* did not endorse tolerance for *de minimis* discrimination. Rather, the Court's only nod to permissible inequality was in the context of the difficult predictive task faced by the state in setting a statewide compensating tax to be measured against taxes established yearly by different localities. 270 U.S. at 373-74. Consistent with the Court's subsequent cases, the Court made clear that a disproportionate burden on interstate transactions would *not* be tolerable if it was either intentional or "a necessary or continuing result of the scheme of taxation adopted." *Id.*

[34] Given the nature of the discrimination on the face of the statutes at issue in each of the complementary tax cases cited by Petitioners, the legislature could simply have revised the tax imposed on the *interstate* side of the ledger, thus creating near-identical treatment of the in-state and interstate transactions, *while still maintaining and effectuating the basic compensatory purpose of the tax*—namely, *equality* as between interstate and intrastate transactions. As shown above, Petitioners' approach to equality

burton, for instance, though the state sales tax was matched by a use tax of an equal amount, the sales tax deducted from the applicable tax base any amount of the price attributable to overhead expenses, while the use tax did not. 373 U.S. at 67. In-state sales were therefore taxed slightly less than comparable out-of-state sales. In other cases cited by Petitioners, exceptions and exemptions made available solely to in-state businesses similarly belied any claim to equality of treatment.[35]

This case is not similar. Here, the feature of the tax law said to create the discriminatory inequality is simply the juxtaposition of a statewide use tax—the tax being challenged—with a *variation* in sales tax within the state. In by far the greatest number of instances—and overall—the rate set by the state leaves in-state transactions *more* heavily burdened than interstate transactions.

3. In each of the cases cited by Petitioners, in-state transactions fared better than out-of-state transactions in some instances, and at least as well as out-of-state transactions in the rest. The *net* effect (of all transactions) was, therefore, that *interstate commerce* was more heavily burdened than *intrastate commerce* by virtue of the tax structure being challenged. *E.g. Boston Stock Exch.*, 429

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in this case would require much more substantial revisions to the state tax structure.

[35] *See Westinghouse Electric Co. v. Tully,* 466 U.S. 388, 404-5 (1984); *Maryland v. Louisiana,* 451 U.S. at 756-60. Petitioner's reliance on *Kraft General Foods, Inc. v. Iowa Dep't of Revenue,* —— U.S. ——, 112 S. Ct. 2365 (1992) is misplaced. The issue presented in that case was under the Foreign Commerce Clause and not the Interstate Commerce Clause. As respects the issue of overall benefit to the state resulting from the tax structure, the Court was careful to note that "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce." *Id.* at 2370. Even were it not, it would be difficult to find an analogy between that case and this one.

U.S. at 323-28. Interstate commerce was thus discouraged. Because interstate commerce was being asked to shoulder more than its fair share of the tax burden, the tax system could properly be described as discriminating against interstate commerce, imposing on it an unjust burden, or reflecting an affirmative effort to protect local businesses generally (or some of them) by taxing interstate commerce more heavily.[36]

The same is true of the *non*-tax cases invoked by Petitioners. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources,* for example, the Court held that a county restriction on importation of out-of-county wastes discriminated against interstate commerce. —— U.S. ——, 112 S. Ct. 2019 (1992). Although the county did not distinguish between out-of-state waste and in-state (but out-of-county) waste, the overall discrimination against interstate commerce could be plainly seen on the state level. The *net* effect of the county ordinance was that, because of the county's policy, *less* interstate waste would flow into the state than would otherwise flow into the state. *Id.* at 2025. The discriminatory effect on interstate commerce was clear. *See also Dean Milk Co. v. Madison, Wisconsin,* 340 U.S. 349, 354 (1951). That overall negative effect on interstate commerce is precisely what is lacking here.

4. In each of Petitioners' cases, the classification established by the statutory scheme offered a concise and clear inequality in treatment, suggestive of protectionism

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[36] As summed up by the court below, "In each of these cases the taxes that were found unconstitutional imposed higher use taxes both on an individual basis and on an average statewide basis. . . . Whether the discrimination against interstate commerce was small or large in dollar amount, it was mandated in every transaction and unmitigated by the structure of the tax." 857 S.W.2d at 191.

and discrimination.[37] The relevant statutes clearly, and (from appearances) purposely, created not only beneficiaries, but also victims—persons engaging in interstate commerce who were, unlike their in-state counterparts, being asked to bear the brunt of the tax. On one side of the classification, some definable in-state industry was specifically favored, or all in-state businesses benefitted by being permitted to take advantage of the provisions at issue; on the other side, similarly situated interstate commerce or specific businesses bore the burden.

In this case, however, out-of-state sellers are *not* victimized by the state tax rate: Petitioners concede that such sellers could not be considered victims of discrimination if the use tax rate matched the sales tax rate. From the vantage point of out-of-state sellers, however, a use tax rate set at the *average* sales tax rate has the same effect. Out-of-state purchasing is encouraged in some instances, and discouraged in others. When the use tax is set at the average sales tax rate, the *net* effect on

[37] In the equal protection context, the Court has been reluctant to define discrimination in a way that would extend to the combined interactions of numerous government bodies; the hallmark of prohibited "discrimination" involves differential treatment between clearly demarcated classes. In *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), the Court declined to extend exacting scrutiny to a "system that allegedly discriminates against a large, diverse and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts." The difficulty in defining the classification made it difficult to describe the scheme as discriminatory. *Id.* at 24-27. Indeed, the Court was "asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests." *Id.* at 40. The Court noted, however, that "[n]o scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism. . . ." *Id.* at 41.

out-of-state sellers is a wash, just as it is when the in-state sales tax rate and the use tax rate are the same. Here, of course, the use tax rate is lower.[38]

Beyond the absence of some overall negative effect on interstate commerce, there is nothing in the *structure* of this tax that prejudices any identifiable out-of-state industry in competition with local businesses. That is, the face of the tax evinces no purposeful discrimination against some segment of interstate commerce. Moreover, there is nothing in the record to suggest that, as the tax actually falls, some identifiable out-of-state industry is disadvantaged in relation to some in-state industry—let alone that this was a purpose of the tax structure.

Quite unlike the cases cited by Petitioners, the unevenness of treatment alleged in this case is the product of a complex interlocution of different taxes, state and local, imposed by various governmental units acting independently. It is difficult to describe the product of such independent decisions as "discriminatory" in any previously defined sense.[39] In short, there is no discrimination

[38] From the vantage point of the in-state *purchaser*, there is also no prejudice in the rate. Just as any other purchaser of goods in the state, it can shop around for a tax rate that it finds attractive, whether it be the use tax rate on out-of-state purchases or any of the multitude of rates available within the state.

[39] This Court has inferred discriminatory intent in a statute when its structure and design tends to exclude the possibility of a non-discriminatory purpose—that is, when the discriminatory or protectionist burden placed upon interstate commerce is crisp and manifest. *See Boston Stock Exch.*, 429 U.S. at 330-32. The structure of the tax at issue here evinces the *absence* of a discriminatory purpose or plan.

By contrast, in *Bacchus Imports, Ltd. v. Dias*, there was an obvious effort to exempt a specific local business from a tax. 468 U.S. 263, 271 (1984). The consciously and clearly drawn lines defining the exempt class in *Bacchus* evidenced a clear *purpose* to discriminate against interstate commerce in favor of a local industry. The patchwork of local authority at issue in this case is not similarly suggestive of a discriminatory plan.

against interstate commerce or any identifiable segment of interstate commerce, either in purpose or effect.

The unusual issue of equality presented in this case is largely *sui generis*. It is sufficient here that in dealing with the practical problem presented—where the variation in the in-state rate suggests no protectionist purpose—the rate the state has set is consistent with this Court's cases and the underlying premises of the Commerce Clause. If the state is to meet its compelling need to tax interstate transactions equally, the state can do no better than set a rate that is not higher than the average rate to which in-state sales are subject.[40]

III. THE NOTION OF EQUALITY POSITED BY PETITIONERS IS NEITHER REQUIRED BY THE COMMERCE CLAUSE NOR THIS COURT'S COMMERCE CLAUSE CASES

Although the touchstone of state tax constitutionality under the Commerce Clause is whether the tax discriminates against interstate commerce, "discrimination," as Professor Gunther has explained, "is not a self-defining term." G. Gunther, *Constitutional Law* 25 (12th ed. 1991). Rather, the meaning of that term must vary with the circumstances.[41] As shown above, in the context of determining a constitutionally acceptable tax rate applicable to interstate transactions to complement varying

[40] The Court need not reach the question whether the state must establish a precise way of matching the tax on interstate transactions to each and every in-state transaction when it can easily do so. If interstate transactions can be treated the same as intrastate transactions, the same treatment may be required. But the same tax cannot always be imposed on interstate and intrastate transactions—and this fact is the foundation for the basic principle of complementary taxation.

[41] "Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries." *Gregg Dyeing*, 286 U.S. at 481.

local tax rates, discrimination is defined with reference not to the lowest rate available anywhere in the state, but to the average in-state rate.

Petitioners' argument rests, in contrast, on the postulate that if an individual purchaser or seller involved in interstate commerce is somehow treated less favorably than *some* intrastate purchaser or seller of goods, there is a prohibited discrimination against interstate commerce. Petitioners' *amicus* states that premise directly, telling the Court that the Commerce Clause requires a "bright line test" [42] under which a state must provide interstate commerce with "absolute equality" in "each and every instance." Amicus Br. at 9, 19. In other words, the unsupported premise of Petitioners' and *amicus*' position is that if the use tax is higher than the sales tax that applies to even one transaction within the state, the use tax is discriminatory and impermissible.

That notion of equality, under which interstate commerce is guaranteed "most favored taxpayer treatment" [43]

[42] Although *amicus* states that this view is "clear from this Court's precedents," *amicus* is unable to cite even one case supporting a rule that "absolute equality" represents the constitutional minima. *See* Amicus Br. at 10-16. Moreover, Petitioners and their *amicus* fail to explain *why* such a rule ought to be adopted except to assert that it would provide a "bright line." Amicus Br. at 15; Pet. Br. at 22. A line based on the average in-state rate would be equally bright and more consistent with commerce clause principles.

[43] *See Dep't. of Revenue of Oregon v. ACF Industries, Inc.*, No. 92-74 (January 24, 1994). In *ACF Industries*, this Court made clear that the idea of nondiscriminatory treatment for interstate commerce does not necessarily encompass "most favored taxpayer" treatment. The Court considered a statute under which Congress' definition of discrimination against interstate commerce was at issue. This Court concluded that Congress had mandated equality of treatment for railroads, but had defined the comparison between railroads and other taxpayers so as to exclude from the comparison entities that were entirely *exempted* from the tax in question. That some taxpayers would fare better than the railroads did not necessarily mean that there was "discrimination," at least where

is not supported by this Court's commerce clause cases, and assuredly is not geared to finding an appropriate match to *varying* local tax rates. As explained above, in the unique situation created by varying local tax rates within an otherwise concededly complementary tax structure, the Commerce Clause is satisfied when the rate applied to interstate commerce is no higher than the average in-state rate. That one might find some sales in interstate commerce taxed at a higher rate than some in-state sales does not mean that the tax discriminates against interstate commerce in light of the fact that one can just as easily (and more frequently) find that in-state sales are taxed at a higher rate than interstate sales. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980) ("Legislation that visits *effects* equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn") (emphasis added); *Travellers'*, 185 U.S. at 162. That approach is fully consistent with this Court's stated understanding of discrimination and equality under the Commerce Clause generally. For example, in *Bacchus*, the Court explained that a finding of discrimination does "not depend upon whether one focuses upon the benefitted or burdened *party*. A discrimination claim, by its nature, requires a comparison of the two *classifications*." 468 U.S. at 273 (emphasis added). So long as the state refrains from drawing lines which burden interstate commerce as a class more heavily than in-state commerce, interstate commerce is not discouraged and (at least so long as there is no other discriminatory purpose at play) the objectives of the Commerce Clause have been achieved.

The Court has summed up that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burden-

there was no "singling out." 1994 U.S. LEXIS 1141, *26-27. *See id.* at *28 (Stevens, J. dissenting) (statute "merely protects railroads from discrimination, rather than conferring on them a right to be treated like the most favorably treated taxpayer").

ing interstate commerce." *Amerada Hess Corp. v. New Jersey Div. of Taxation*, 490 U.S. 66, 75 (1989). The tax structure here is not facially discriminatory: there is no line drawn here with in-state commerce, uniformly favored on one side, and interstate commerce burdened on the other. There is no discriminatory intent: the structure of the tax and the rate currently in effect suggests no desire to disadvantage out-of-state businesses. And there is no *undue* burden: interstate commerce is not bearing any greater proportion of the burden than in-state commerce. Whether one focuses on interstate commerce generally, or any identifiable subset of that commerce (in the form of a particular business or industry), each of these prohibited conditions is absent.

Petitioners' approach to discrimination and "absolute equality" rests, in contrast, on a sensitivity to individualized disparities in treatment arguably more appropriate to equal protection than commerce clause cases. The Commerce and Equal Protection Clauses "perform different functions in the analysis of the permissible scope of a State's power—one protects *interstate commerce*, and the other protects *persons* from unconstitutional discrimination by the States." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) (emphasis added; footnote omitted). This is so because the Commerce Clause " 'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Gov. of Maryland*, 437 U.S. at 127-28).[44]

In formulating and applying the anti-discrimination principle, the Court has consistently been guided by the

[44] Just as the "antitrust laws . . . were enacted for the protection of competition, not competitors," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), so too was the Commerce Clause designed to protect commerce, not individual commercial entities.

Clause's purpose: to implement the Framers' conviction that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *See Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979). The Clause thus ensures that "the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States. . . ." *Wardair Canada, Inc. v. Florida Dep't. of Revenue*, 477 U.S. 1, 8 (1986); *see also Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827).

The focus on the need for unity within the Nation (rather than a desire for some sort of individualized protection for interstate dealers) ultimately accounts for the Court's prohibition on discrimination against interstate commerce. The anti-discrimination principle "follows inexorably" from the basic purpose of the Clause as a barrier to the forms of economic protectionism practiced by the states under the Articles of Confederation. *See Boston Stock Exch.*, 429 U.S. at 329. And indeed, the Court has often stated the test of discrimination in terms of whether the distinction at issue suggests or manifests some form of favoritism for in-state economic interests. *E.g., Clover Leaf Creamery Co.*, 449 U.S. at 471; *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523-28 (1935); *BT Investment Managers, Inc.*, 447 U.S. at 35-37. The absence of protectionism either in evident purpose or effect precludes a finding of unlawful discrimination in commerce clause cases.[45]

There is no suggestion on the face of the rate, or in the sales tax-use tax structure, of a plan or intention to

[45] That is why even clear discrimination against interstate commerce will survive constitutional challenge if "justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, —— U.S. ——, 112 S. Ct. 789, 800 (1992) (citation omitted); *Bacchus*, 468 U.S. at 270.

shield in-state industry generally or some particular industry from interstate competition. At the established rate, most in-state sellers continue to be burdened more heavily than out-of-state sellers. While the patchwork of local tax rates in Missouri results in a rate in some areas that is less than the use tax rate, it cannot fairly be described as discrimination against *interstate commerce*, for neither that commerce generally nor any identifiable segment of it is treated less favorably than in-state commerce. When the state draws a line by establishing a tax rate which continues to burden in-state sellers more heavily than out-of-state sellers, interstate commerce does not bear a disproportionate burden of the state tax in question, and interstate sellers are not adversely affected by such rates.

In addressing issues of discrimination, it is axiomatic that "equal treatment" does not always mean the "same" treatment, but rather equally fair or just treatment.[46] In the case of complementary taxes addressed to varying local tax rates, where an exact match is impossible, the state is clearly at pains to be equally fair to interstate commerce when it fixes the rate of taxation on interstate sales at less than the average rate applied to in-state sales. By doing so, the state affords the even-handed treatment (*Boston Stock Exch.*, 429 U.S. at 332) which the Commerce Clause requires.

This case does not present the question whether use of an average in-state rate (or, for that matter, an analysis which weighed the overall burden on interstate commerce against the burden on intrastate commerce) would suffice as a constitutional test of discrimination in every situation. *Compare American Trucking Ass'ns v. Scheiner*, 483 U.S. at 266, 296-97 (1986) (state compelled to use

[46] *Cf. Halliburton*, 373 U.S. at 77 (Brennan, J. concurring) ("if the Constitution does not mandate absolute equality of treatment as between in-state and out-of-state sales, it assuredly does forbid discriminatory treatment by the States").

a more accurate method of apportioning tax) *with Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) (no more accurate means available). A more difficult case might be presented if—despite the fact that on the whole, interstate commerce did not suffer—the statute at issue disadvantaged some identifiable out-of-state industry relative to its in-state counterpart. Such a circumstance would present, at the very least, a colorable basis upon which to argue a protectionist or discriminatory purpose underlying the tax. But, in the absence of any indicia of protectionism, where the claimed unevenness in treatment is a function of varying local tax rates, the average in-state rate provides a suitable reference point for determining whether the state has discriminated against interstate commerce. Nothing in this Court's cases requires that this approach be abandoned. To the contrary, acceptance of Petitioners' approach to "absolute equality" in "each and every instance" would require the adoption of a broad new rule of uncertain scope and implication.

IV. *GENERAL AMERICAN* SHOULD NOT BE OVERRULED

1. Petitioners have asked that *General American* be overruled. As shown above, nothing in this Court's recent cases has undermined the practical approach to the issue of varying local tax rates adopted by the Court in *General American*. But even if it perceived a tension between *General American* and later precedent, the Court ought not overrule *General American*.

2. In commerce clause cases, *stare decisis* has special force, for the issues involved are often ones "that Congress may be better qualified to resolve, . . . [and] has the ultimate power to resolve." *Quill*, 112 S. Ct. at 1916 (footnote omitted). No matter how the Court might "evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. . . . Congress has the power to protect interstate commerce from intolerable or even undesirable burdens." *Id.*

3. In *Quill*, the Court acknowledged that the bright-line approach employed in *Bellas Hess* (386 U.S. 753 (1967)) was inconsistent with more recent cases. Nonetheless, the Court was unwilling to overrule that case. The Court thus retained a *restriction* on state taxing power.

The Court ought to be doubly reluctant to overrule precedent where the effect is to impose new restrictions on state taxing power. The Commerce Clause is not intended and should not be used to "eclipse the reserved 'power of the States to tax for the support of their own governments.'" *Boston Stock Exch.*, 429 U.S. at 328 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 87 (1824)). Respect for state taxing authority and state fiscal needs counsels caution.

4. Moreover, the Court ought to be reluctant to intrude on the allocation of taxing power as between a state and its subdivisions, as the adoption of the rule advanced by Petitioners would likely require. As shown above, the form of inequality about which Petitioners complain is inherent in the State's decision to afford localities taxing power, including the power to set rates to meet local needs. This political allocation of power ought not be disturbed by the Court—at least not without some solid evidence that it actually undermines a core value of the Commerce Clause.

5. *General American* is fully consistent with the modern approach to commerce clause problems. The focus of the *General American* approach is squarely on "economic realities" (*see Complete Auto Transit*, 430 U.S. at 279), "measured in dollars and cents, not legal abstractions." *Halliburton*, 373 U.S. at 70 (footnote omitted). It addresses a particular problem with a logical rule. In contrast, Petitioners' approach would substitute abstraction and formalism—in the form of adoption of one spe-

cific notion of "absolute equality"—for an approach which focuses on the economic realities. Petitioners' proposed rule that a use tax operates unconstitutionally if interstate transactions are taxed at a higher rate than intrastate sales "in some areas," would ignore the central economic reality that in Missouri interstate commerce is actually encouraged by the overall sales tax-use tax structure which Petitioners challenge.

Overruling *General American* in favor of Petitioners' approach would not bring some aberrant rule of law into line with prevailing precedent. Rather, it would establish a new rule and extend the Commerce Clause's anti-discrimination principle far beyond where it has been taken before. At the same time, it would prevent the state from achieving its legitimate end of equalizing the tax burden on the consumption of goods between purchases in and out-of-state. *General American* reflects a logical approach to a specialized problem fully consistent with basic commerce clause principles.

CONCLUSION

The judgment should be affirmed.

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